No. 86-228

In The
Supreme Court of the United States
October Term, 1986

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY MEMORANDUM TO THE MOTIONS AND BRIEFS OF THE AMICI IN SUPPORT OF THE GOVERNMENT

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SUMMARY

There is no admissible evidence in the record that petitioner is other than a naturalized Lithuanian emigre to the United States who led a relatively uneventful life, until retirement, as a dental technician. No cross petition was filed by the Government to raise the issue as to whether the District Court was manifestly erroneous in finding that the Soviet depositions were unreliable or engaged in a gross abuse of discretion in ruling that to admit the Soviet depositions would constitute a denial of fundamental fairness and thus deprive petitioner of due process of law. Nevertheless, the amici in support of the Government have gone outside the record of admissable evidence and injected into their Briefs contentions and arguments based on Soviet depositions ruled inadmissable and found unreliable by the District Court. (ADL BR. 3-12, 25-28; WJC BR. 2, 5-6, 16-19).[1]

The issues on which this Court granted certiorari all involve the proper standard for determining "materiality" of misrepresentations as to date and town of birth under the denaturalization statute, 8 U.S.C. 1451(a). The "hydraulic pressure" created by accusations of participation in atrocities serves not only to distract from the Questions Presented, but also poses a great challenge to the fairness, impartiality and integrity of our judicial system since those organizations, otherwise dedicated to individual rights, would use the atrocities charges as a basis for diluting the rights of naturalized citizens by enhancing govern-

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[1] Page citations to the Motion and Brief of the Anti-Defamation League of B'nai B'rith, etc. are preceded by "ADL BR.", page citations to the Motion and Brief of the World Jewish Congress are preceded by "WJC BR."; page citations to the Court of Appeals Appendix volumes are preceded by the letter "A"; and page citations to the Court of Appeals Trial Exhibit volumes are preceded by the letter "X".

ment power to denaturalize under a mere "possibility" test.[2] Petitioner, thus, feels compelled to diffuse that pressure by providing this Court with the scope of what was before the District Court when, it found in a non-jury trial, that the Soviet depositions were unreliable and inadmissable against petitioner.

Prior to its ruling, the District Court examined all of the material, including viewing the Soviet videotape, offered by the Government. As demonstrated by the record and the Opinion of the District Court, no court could have exercised its discretion on admitting evidence in any other way and still have accorded due process of law to the petitioner.

ARGUMENT

I. THE RECORD SHOWS PETITIONER'S BACKGROUND MADE IT UNLIKELY HE WOULD COMMIT ANY ATROCITY

After six years as a seminarian, petitioner obtained the equivalent of one year of ROTC training and then spent two months of military service with the army of the Republic of Lithuania during peacetime in the latter part of 1939. (X144-145). By the time the Germans invaded Lithuania in June of 1941, petitioner, the alleged leader of the atrocities, was a 25-year-old bookkeeper in a branch of the Bank of Lithuania and lived in a boarding house. As he disclosed in his immigration papers (J.A. 43), he was a member of the Sauliai who attended choir practices

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[2] Such a short sighted approach ignores the historical use of immigration laws to punish the undesirable of the times, such as the post-World War I Palmer raids when thousands of Jews and Italians were deported as revolutionaries, "often on the flimsiest of evidence." M. Seller, *Historical Perspective on American Immigration Policy*, 45 Law & Contemp. Probs. 137. 151 (Spring 1982).

until it was disbanded by the Russians after they invaded Lithuania in 1940. The Sauliai has never been on any "inimical list" and membership therein has never disqualified anyone from obtaining a visa or citizenship. Petitioner was never by employment, occupation, or military service ineligible for a visa or citizenship (J.A. 222). The Government conceded at the trial that this is not a "status" case (J.A. 222), such as the one brought against Feodor Fedorenko under the Displaced Persons Act of 1948, which was not enacted until after petitioner obtained his visa.

The Government offered in evidence the deposition testimony of his sister-in-law, Juze Rudzeviciene, who testified that petitioner was a non-violent, religious man, who never possessed a weapon and had never shown any hatred or hostility toward Jews. (X1030-31, 1033, 1067, 1082-83, 1100-01).

During the latter part of 1941 to early 1942, he returned to the seminary in Telsiai, Lithuania (J.A. 51-52) and the listing of his residence on his visa application during that period is correct (J.A. 30).

During the German occupation, petitioner worked first in a print shop in Kaunas and then as a bookkeeper in a mom and pop brush and broom shop in that city. (A1247-48). His internal Lithuanian passport, which was part of his immigration file when he obtained his visa, listed his occupation as "office worker" (J.A. 28).

There is some evidence in the record, as the District Court found, that he risked being persecuted by the Nazis for high treason by assisting the anti-Nazi Lithuanian underground in obtaining printing presses and types and in the distribution of literature advocating resistance to German mobilization of Lithuanians. (Lodging, R.916-919; A1132, A1153; and Janson Exhibit S-1, pp. 10-12.)

In its brief the ADL splices together disassociated "facts" not in the record to create a chameleonic "list" from which it argues that the petitioner kept a list of the members of "his group" in the "commandant's office." (ADL BR. 6-7).

The ADL contends that the mythical "list" (which was not a list of former Siauliai members) described in the excluded Kriunas deposition, was the same "list" referred to six months earlier by the petitioner when, in October 1981, he wrote a letter (J.A. 138-139) referring to what he mistakenly assumed to be a list of former Siauliai members obtained by the Soviets from the office of the former Lithuanian Army commandant (following the first Soviet invasion of Lithuania in 1940). In fact, the only list the Government had was its own attorneys' prepared list of Lithuanian names used by the Government during an interrogation of the petitioner prior to filing this action.[3]

At trial petitioner explained that his letter referred to a list of Sauliai members maintained by the *Lithuanian* commandant prior to 1940, and he testified unequivocally that he personally never had access to, nor saw, any such list. (Lodging, R.826).

Mrs. Kungys testified that when she and the petitioner left the City of Kaunas in the summer of 1944, it was virtually being emptied as people fled from the Soviet front. (Lodging, R.1061). She further testified that petitioner

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[3] The OSI "list" apparently consists of 44 names of persons who have nothing in common apart from the coincidence that they are Lithuanian and include such people as petitioner's brothers, a sister, and sister-in-law, none of whom were in Kedainiai at the time of the killings in 1941. Mrs. Kungys, who was born and raised in Kedainiai, was read the names on the OSI list and could recognize only ten persons, such as a priest, a butcher, a school teacher, and relatives. (Dep. Trans. pp. 132-143; Docket Entry 74).

did not want to leave Lithuania (Lodging, R.1062), and they stayed for three months near his parents' farm near the German border until bombs were literally exploding on the farm. (Lodging, R.1206). Her brother had sent her letters imploring that they get close to the Western Front and join him in Strausberg, Germany. (Lodging, R.1061).

Contrary to the false impression of petitioner's privileged flight and reception into Germany (ADL BR. 8), Koncius and Mrs. Kungys testified that petitioner had been seized under gunpoint by the Nazi S.D. and forced to dig trenches under severe conditions until he led an escape (Lodging, R.1063-1070, 1208-1210), and eventually got to the rural area around Tuebingen, where he knew a Lithuanian refugee priest. (A1259). The District Court found that Koncius' testimony had the "ring of complete truthfulness." (Pet. App. 115a).

In its brief the ADL contends that petitioner and his wife received permission from Nazi authorities to reside in Germany "without special restrictions" and that his wife petitioned for permission to practice dentistry in the Nazi Reich (ADL BR. 8). There is no evidence in the record that petitioner received any special benefits or any favored treatment from the "Nazis" and his wife did not receive permission to practice dentistry until after the Allies occupied the area. (Lodging, R.1072).

Unchallenged testimony concerning the conditions under which the Kungy's family lived as refugees in Germany was provided through the testimony of both Mrs. Kungys (A1237-1248; Lodging, R.1060-1074; A1264-1282) and Yuozas Koncius (Lodging, R.1202-1223; A1414-1422). Based upon that testimony, the District Court found that the Kungys family lived in a refugee camp and that from that camp the petitioner and his brothers went out into the countryside and "joined prisoners of war and other

displaced persons working on neighboring farms." (Pet. App. 116a-117a). It can hardly be plausibly argued that living in a refugee camp and working along with prisoners of war and other refugees on a farm in order to keep your family from starving constituted "favored treatment" or the receipt of the "benefits" of living and working under rural German civil authorities. The amici rhetoric is based solely upon the fact that no *special restrictions* were placed on the petitioner or his family (such as would have been placed on a fugitive, or prisoner of war). (Lodging, R.843). The Government offered no evidence even to suggest that the petitioner and his family were treated any differently than the tens of thousands of other refugees who fled the advance of the at least equally despicable Red Army and ended up in refugee camps in German in the final turbulent days of the War.

No UNRRA screening committee, on which there were Soviet representatives, ever accused petitioner of being a Nazi collaborator. (See J.A. 69). After the Allied occupation, German civil authorities attested to the good conduct of petitioner (J.A. 37) and not even the Soviets had made any accusation against petitioner at the time of his application for visa in 1947 or citizenship in 1954. (X19-20).

II. THERE IS A COMPLETE ABSENCE OF FREE WORLD EVIDENCE AGAINST PETITIONER

In advancing their mere "possibility" test, the amici contend that it is possible that if the consular officers had investigated in January 1947 they "might have" found evidence petitioner participated in atrocities. (ADL BR. 28, WJC 16-19).[4] Only rhetoric could support such sheer

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[4] The American consular officers did not and could not have had access to Soviet sources of investigation (NKVD). As former vice consul Finger testified the sources of investigation were the consular files, the German police and the refugee camps. (J.A. 198-199).

speculation. The government admitted during discovery that there was no information about petitioner in the records of the Federal Bureau of Investigation, the Central Intelligence Agency, the State Department Office of Security, the Berlin Document Center, Federal Republic of Germany, the Weisenthal files, the International Refugee Organization, and the Subcommittee of Immigration, Citizenship and International Law of the Judiciary Committee. [Answers to Interrogatories No. 39, 41-45, and 48 (X1314-1315)]. In response to petitioner's requests to admit, the Government conceded there were no records that petitioner was ever a member of the Nazi party, the German military, any police organization, or that he ever was convicted of a crime anywhere. (X19-20, X1309-10, Admission and amended Admissions, 3, 4, 18, 19, 21, 26, 45, and concessions at oral argument on January 24, 1983 before Magistrate Peretti, Docket Entry No. 115).

At the trial, the Government did not produce a single witness in the Free World who had first-person actual knowledge that petitioner committed any atrocity. The Government introduced voluminous German records which depicted the Nazi persecutions and murders through Lithuania (G Series, X212-474). The Government admitted that none of the German records contains petitioner's name or indicates that the petitioner had in any way participated in any of the persecutions or killings. (Admission No. 26, A573). In fact, the German records do not even reflect that any Lithuanian residing in Kedainiai participated.[5]

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[5] In its opinion, the District Court found:

> "[the German records] constitute evidence that [the Nazis] used local people in the course of their work, they do not refer to the use of local people at the killings in Kedainiai nor do they implicate the defendant in this case in any way." (Pet. App. 52a).

(Continued on following page)

The petitioner testified and denied that he participated in any of the persecutions or killings. (A1068-69).

III. THE ACCUSATIONS AGAINST PETITIONER EMANATE FROM THE KGB AND SOVIET DISINFORMATION AGAINST BALTIC EMIGRES

The District Court found that the Soviet obsession with eradicating all traces of nationalism in Lithuania raised substantial doubts about its role as the source of accusations against petitioner. (Pet. App. 89a).[6] In view of the acknowledged reliance by the Government since 1979 upon Soviet authorities for both "investigation" and the "production of witnesses", at the trial petitioner put in evidence the unrebutted Free World testimony of a former KGB agent, Imants Lezinskis (X1316-1400), a former CIA agent, Melbourne Hartman (X1401-55; X1712-1826), a Baltic scholar, Tonu Parming (X1456-1511), a former investigator for the Lithuanian procurator, Zigmas Butkus (X1512-98), and a former Soviet procurator, Fredrich Neznansky (X1668-1711). Their testimony described

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(Continued from previous page)

That finding was corroborated by the testimony of the OSI historian Hilberg. (A573). He conceded the German word for "local" (ortlich") is not contained in any document referring to Kedainiai. (A533). He admitted he had no knowledge of petitioner (A432-433).

[6] The Soviets were so incensed that a Lithuanian priest in the United States sent care packages to Lithuania, he was sentenced *in absentia* (X113). The Kungys family continuously sent care packages to relatives in Lithuania. (J.A. 78). As found by the District Court in *U.S. v. Kowalchuk*, 571 F.Supp. 72 (E.D.Pa. 1983),

"That practice was frowned upon by the Soviet authorities, not only because it was viewed as an unwelcome reminder of the disparities between the living conditions in the United States and in the Soviet-controlled Ukraine, but also because most Ukrainian emigres were supporters of Ukrainian independence . . . But as a result of the correspondence, Soviet officials learned of defendant's existence and whereabouts." 571 F.Supp. at 77-78.

(a) Soviet continuing efforts to counter nationalistic feelings in the Baltics by discrediting emigres to the Free World from the Baltic states by accusing them as being war criminals; and (b) the Soviet prosecutorial system being but a satellite of the state security apparatus with no inhibitions against using forged or fabricated evidence and perjured testimony in "political" cases.

Cumulatively, they described a morally corrupt judicial system totally subjugated to the communist political system, where the use of fabricated evidence and perjured testimony is the norm. It is no salve to the constitutional rights of the naturalized citizen that the cold hand of the KGB is in the warm glove of the OSI, when the Soviets reach across the seas in pursuance of Soviet goals.

Lezinskis (who testified under protective CIA custody), in particular, described the KGB *modus operandi* in discrediting Baltic emigres which parallels the Soviet involvement in this case. The Soviet Union has no genuine interest in seeking redress for the victimization of Soviet Jews, but, starting with the Khrushchev era, it engaged in periodic "campaigns" against alleged war criminals.[7] KGB agents would obtain "protocols" of people from different social strata, including former "gulag" prisoners, especially those who were vulnerable to being incarcerated or reincarcerated. (X1349). It mattered not that the evidence was non-existent or that the stories were inconsistent, as long as the accusations came from a cross section

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[7] Lezinskis testified that the intensity of the Soviet accusations was the result of the Carter Administration's criticism of the Soviet violations of the civil rights of Soviet Jewry and the Helsinki document. (X1355). The role of the KGB in "war crimes" cases is corroborated in the testimony of former Soviet procurator Neznansky (X1618, 1643, 1687-95).

of the community. The KGB would then have stories planted in the Israeli and American press hoping to instigate an investigation of the Baltic emigre. (X1353-4). The purpose is not only to claim the United States is harboring "war criminals" but to quelch all vestiges of Baltic nationalism. (X1337-8). In this case the KGB obtained protocols and then produced for deposition Kriunas, who had spent 10 years in a gulag; Narusevicius, who had received a 25-year sentence; Dailide, a trade school teacher; Silvestravicius, a truck driver; and Devidonis, a bus driver.[8]

Although the Government refused to answer petitioner's interrogatories as to when the investigation began (Interrog. 38), or to identify and produce any correspondence, diplomatic notes, or cable traffic with the Soviet Union (Interrog. 39), the amici, as well as the Government in its Brief to this Court (U.S. BR. 44-45), have now argued that this Court should establish a "possibility" test of materiality which permits speculation as to what an investigation in the Soviet Union would have disclosed at the time of petitioner's application for a visa in 1947 and for citizenship in 1954. In fact, the earliest disclosed Soviet accusation against the petitioner (as well as 12 other Lithuanian emigres to the United States) was a KGB-planted article in the November 24, 1965 edition

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[8] Butkus testified that the Soviet depositions are not even conducted in accordance with Soviet law, let alone the Federal Rules of Civil Procedure as required by the District Court's order of October 14, 1981 or the 1935 Treaty between the United States and the Soviet Union. Neznansky testified that in "political" cases, no criminal procedure is applicable, such cases are handled by the KGB, who obtain incriminating evidence at whatever cost and give secret instructions to procurators on how to handle such cases (X1666), including tampering with evidence and transcripts (X1694). Because the accused person is an "enemy" of the people, witnesses are told it is their "civic duty" to testify in the appropriate way. (X1694).

of *Morning Freiheit*, recognized by the FBI and Congress as a Communist propaganda rag for over a quarter century (see House Report 1311), (see also Lezinskis, X1335, 1339-40, 1353-54). It is that article which first led to the INS interview of petitioner in 1975 (J.A.70-79), long after he had received his visa in 1948 and been naturalized in 1954.

IV. THE DISTRICT COURT PROPERLY RULED THAT THE SOVIET DEPOSITIONS WERE INADMISSABLE

The District Court watched the videotaped depositions of six Soviet witnesses; reviewed "protocols" purporting to represent prior statements of the deponents taken by the Soviet government; and considered the objections to the Soviet depositions advanced on behalf of the petitioner. In its opinion, the District Court ruled:

> "I have concluded that these depositions, insofar as they purport to inculpate defendant, are *unreliable and* were taken under such circumstances that their use against defendant would violate fundamental consideration of fairness. No single factor compels this conclusion, but the circumstances in their totality permit no other conclusion." (Pet. App. 86a) (emphasis added).[9]

The District Court then undertook a detailed analysis of the reasons for that ultimate finding, and found, *inter*

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[9] The Soviet depositions were taken *de bene esse* pursuant to an order dated October 14, 1981 (A50-52). That order provided that the depositions would "be governed by the Federal Rules of Civil Procedure and plaintiff shall not interfere directly or indirectly with the right of defense counsel to conduct a full and free cross-examination of each witness" (A52), and that "no witness shall be instructed by plaintiff not to answer any questions." (A52). That order also provided that the Government "shall have present at each day of each deposition in Europe translators proficient in Lithuanian and Russian who are disinterested in the outcome of the lawsuit. . . ." (A52; Pet. App. 95a). At the depositions the Government disregarded such fundamental procedural safeguards.

alia, (a) "many aspects of the deposition procedures cast doubt upon the reliability of the testimony concerning defendant" (Pet. App. 95a) including: (1) warm up questioning by the Soviet Procurator to lock in the witnesses' testimony (Pet. App. 97a-98a); (2) limitations imposed by Soviet Procurators on the scope of petitioner's cross-examination of the Soviet witnesses (Pet. App. 98a-101a); (3) interference with petitioner's cross-examination of the Soviet witnesses by the Soviet procurator (Pet. App. 99a-100a); (4) strategic omissions and mistranslations of the testimony of the Soviet witnesses by the Soviet interpreters (Pet. App. 101a); (5) the pervasive use of blatantly leading questions by the Government, "improperly affecting" the entire proceeding (Pet. App. 98a); and (6) interference by the Government in the cross-examination of the Soviet witnesses (Pet. App. 100a); and (b) "that these depositions, insofar as they purport to inculpate defendant, are unreliable" (Pet. App. 86a), noting (a) material inconsistencies between the deposition testimony and the deponents' "protocols" (Pet. App. 104a-105a); (b) the failure of any witness to identify unequivocally the wartime photograph of petitioner (Pet. App. 80a, 83a, 86a); (c) the absence of earlier "protocols" and transcripts of earlier testimony by the deponents about the Kedainiai killings (Pet. App. 105a-108a); (d) the potential for undue influence by Soviet authorities over the deponents (Pet. App. 97a-105a); and (e) material inconsistencies in the testimony of the Soviet witnesses.

Following that lengthy analysis of its holding, the Court finally concluded,

> "The Lithuanian depositions will be admitted for the limited purpose of establishing the happening of the killings in Kedainiai in July and August 1941. They will not be admitted as evidence that defendant participated in the killings." (Pet. App. 108a).

A trial court's discretionary determinations as to the admissibility of evidence are significant on appeal only if "manifestly erroneous." *Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284 (3rd Cir. 1979), *cert. denied*, 444 U.S. 917, *reh. denied*, 444 U.S. 985 (1980); *Atlantic Mutual Ins. Co. v. Lavino Shipping Co.*, 441 F.2d 473 (3rd Cir. 1971); *United States v. Lopez*, 543 F.2d 1156 (5th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977).

Moreover, with respect to a non-jury trial, error can *only* be predicated upon a *gross abuse of discretion* with respect to the admissibility of evidence provided the Court considers that which is offered. The trial court, sitting as both judge and trier of the facts, is presumed to disregard the inadmissible and rely upon competent evidence. *Plummer v. Western Intern. Hotels, Co., Inc.*, 656 F.2d 502 (9th Cir. 1981); *Multi-Medical Convalescent and Nursing Center of Towson v. N.L.R.B.*, 550 F.2d 974 (4th Cir. 1977); *United States v. Nicholson*, 492 F.2d 124 (5th Cir. 1974); *Caldwell v. Craighead*, 432 F.2d 213 (6th Cir. 1970), *cert. denied*, 402 U.S. 953 (1971); *Teate v. United States*, 297 F.2d 120 (5th Cir. 1961).

The District Court's determination to give only limited use to the Soviet depositions is well within its *discretion* and consistent with the decisions of several other American courts in denaturalization cases brought by the Government with the assistance of the KGB. Rule 105, Fed. R. Evid.; and See, e.g., *United States v. Linnas*, 527 F.Supp. 427 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir. 1982); *United States v. Osidach*, 513 F.Supp. 51 (E.D. Pa. 1981), *appeal dismissed*, No. 81-1956 (3rd Cir. July 22, 1981); *United States v. Kowalchuk*, 571 F.Supp. 72, 79-80 (E.D.Pa. 1983); 773 F.2d 488 (1985), *cert. den.*, 1065 S. Ct. 1188 (1986). *Maikovskis v. I.N.S.*, [Immigration Court

June 30, 1983, 773 F.2d 435 (2d Cir. 1985), *cert. denied,* 106 S. Ct. 2915 (1986)].

In *United States v. Kowalchuk, supra,* the District Court stated,

> "The testimony of the Soviet witnesses must be viewed with even greater skepticism. . . . Finally, considerations of basic fairness to the defendant militate against accepting the testimony of the government witnesses as 'clear and convincing' proof of charges as serious as those leveled against this defendant." (571 F.Supp. at 79-80).

In its brief to the Court of Appeals in the *Kowalchuk* appeal, the Government stated,

> "The District Court specifically stated that it did not rely on any of the Soviet witness testimony concerning the acts of defendant himself. As most, the Court relied on the Soviet testimony for corroboration of other evidence of the general conditions in Lubomyl and the activities of the Ukrainian militia. Although the government believes that the depositions should have been credited in their entirety, *the District Court was not in error in crediting them only to a limited extent.* (Government Brief, p.37) (Emphasis added).

The District Court noted that each deposition commenced with a warning by the Soviet procurator to the witness of his obligations under Soviet criminal law, and then the Soviet procurator "questioned each witness in broad general terms, such as 'What do you know about the execution of the Soviet activists and the Jews in Kedainiai?' (Narusevicius Dep. at 9)," (Pet. App. 97a). The District Court pointed out that the procurator's questions "called for personal knowledge and knowledge based on all manner of reports and statements of others, with no means of distinguishing one form of knowledge from the other." (Pet. App. 97a). The Soviet "warm up" interrogation of the witnesses attempted to lock in their testi-

mony and was neither neutral nor harmless. Rather, in its opinion the District Court noted the negative effect of the conditioning of the witnesses achieved by the pocurator's questioning which the Court found was "compounded" by the impoper form of questioning by the Government attorneys immediately following. (Pet. App. 98a).

Prior to the Government taking the Soviet depositions, the District Court (speaking through a judge who preceded the trial judge) warned that,

> "This testimony is going to have to be taken according to the rules of evidence that are prevalent in this court. I can't run this thing like an inquisitorial system, this is an adversary versus adversary system. (A57) . . . I don't know how I can try a case under American law under those circumstances. (A58) . . . If the depositions aren't taken in accordance with the rules of procedure that govern this Court, then they will not be admitted, period" (A58).

After viewing the Soviet depositions, the District Court found that "the actions of the pocurator seriously limited the effect of these requirements" (Pet. App. 99a), and expressed its particular concern about the limitations placed on the cross-examination of the Soviet deponents,[10] finding, *inter alia,* that (a) "cross-examination on th[e] subject [of the relationship of all the witnesses with the Soviet authorities] was limited, if not foreclosed" (Pet. App. 100a); (b) "cross-examination directed to prior statements of witnesses and their dealings with Soviet authorities was limited by the rulings of the procurator" (Pet. App. 102a); and (c) "cross-examination of one of the gov-

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[10] The District Court noted that, "A critical question was not only what Devidonis said about defendant in 1977 and 1967. A critical question was *whether at those times he attributed to persons other than defendant responsibility for acts of which* defendant is now charged." (Pet. App. 99a), (emphasis added)

ernment's two most important witnesses, Juiozas Kriunas who had been in the gulag for ten years, was limited by the procurator." (Pet. App. 99a).

The District Court entered an order on October 14, 1981 which provided that the translators for the Soviet Depositions must be "disinterested in the outcome of the lawsuit" and that the identity of the translators and their credentials be disclosed 30 days in advance of the depositions. (A52). In its opinion, the District Court held that the Soviet interpreters used by the Government "was a violation of at least the spirit" of the October 14, 1981 order requiring that the interpreters be "disinterested." (Pet. App. 101a). The 30-day advance notice requirement was ignored by the Government which used whatever Intourist "guides" the Soviet procurator chose to use on any given day.

The unrefuted testimony of defense witness Daiva Kezys was that her viewing of the videotapes disclosed that the Soviet translations were replete with mistranslations and omissions (A15 and A1283-1339). The omitted translations followed a pattern of not disclosing KGB involvement in preparing the witnesses' testimony or facts tending to put the Lithuanian nationalists in a neutral light. Thus, the Soviet translators omitted the testimony of Stasys Narusevisius that his deposition was procured "When I received orders and the statement from the security authorities [Saugumus is the Lithuanian State Security or KGB]" (A1321; X878);[11] mistranslated with respect to the photospread "Everything has been enlarged" (A1328) which would have indicated to defense counsel

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[11] Imants Lezinskis, a former KGB agent, testified that the KGB has no qualms or moral reservations about training witnesses for giving testimony in the Soviet Union for use in the United States (X1397).

that the witness had been shown an improperly suggestive photospread with smaller-sized pictures prior to the deposition by the KGB (X869); omitted to translate "I don't know any of them. You can chop my head off" when shown the photospread (Pet. App. 101a, X869); omitted to translate "During the interrogation I had learned everything what to say like prayers. I do not know anything else" (A1319; Videotape 18:45:50), which, if translated, would have opened up a whole line of inquiry of how the KGB during many hours of interrogations reduced to a few pages of protocols had taught the witnesses to testify by rote; and deliberately switched the witness testimony as to whether Lithuanians participated in shooting the Jews by saying the witness said "There were Lithuanians as well," when in fact he said "There were Germans, but who knows who they were. Maybe there were Lithuanians. Who the devil knows?" (A1316, X829).

The District Court found that although the translators "appeared qualified",

> "[I]t is clear . . . that translations were skewed to throw a favorable light upon Soviet procedures and to cast the most favorable light possible upon the witnesses' testimony implicating defendant. There were strategic omissions of testimony, obviously for the same reason. . . . The omitted phraseology is significant both in itself and for the cross-examination it might have elicited. It is unnecessary to recount the numerous shadings of meaning resulting from the apparent bias of the interpreters. . . . It is always possible to retranslate the entire deposition testimony if necessary, but that would not assist defense counsel who had to cross-examine on the basis of the translations made on the scene." (Pet. App. 101a)

During the course of oral argument prior to the entry of the order of October 14, 1981, the District Court warned the Government attorneys to be careful not to ask leading or other improper questions as the Soviet depositions were

being taken *de bene esse,* and the Government attorney responded, "Oh, certainly, your Honor." (A32). The order of October 14, 1981 expressly reserved all objections until trial. (A52, ¶ 12).

Notwithstanding that warning and the court order, at the Soviet depositions the Government attorneys followed the same format as the Soviet procurator in using a staggering amount of leading questions and eliciting blatantly inadmissible hearsay, which the chief trial counsel of the Government tried to rationalize at trial on the basis that the Soviet procurator had already locked in the witness by such techniques. He represented to the Court that the reason for his plethora of leading questions should be countenaced by the Court was that proper questions would "confuse" and "agitate" the Soviet witnesses. (A1491-2).[12] Thus, the Government examination of Kriunas contained 91 leading questions and 54 questions with either non-responsive or obvious hearsay answers, and the Government examination of Dailide contained 133 leading questions and 32 questions with either non-responsive or obviously hearsay answers. The extent of leading questions resulted in the testimony being tantamount to the prosecutors' testimony and not the witnesses' testimony.[13]

Accordingly, the District Court made the following findings:

> "The government's method of questioning the witnesses compounded the difficulties created by the pro-

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[12] Non-leading questioning by the OSI could have resulted in the Soviet deponents forgetting their stories which Devidonis stated were learned "like prayers." (A1319).

[13] Under Rule 611(c), Fed.R.Evid., leading questions are prohibited except under limited circumstances. In *Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1329 (7th Cir. 1979), the Seventh Circuit pointed out that "the questions excluded consisted of [the witness'] adoption of what was in effect [the] attorney's testimony. . ." (596 F.2d at 1329).

curator's sweeping generalized questions: *The government attorneys persisted time and again to pose blatantly leading questions, drawing upon the protocols which the witnesses had signed and upon the answers which the witnesses had given to the procurator's questions.* Before I concluded that the deposition testimony cannot be admitted for the purpose of implicating defendant in the Kedainiai killings, I attempted to separate the most clearly objectionable questions from less objectionable ones, but *the entire proceeding was improperly affected by this form of questioning.*" (Pet. App. 98a) (Emphasis added).

By virtue of such evidentiary improprieties the resulting testimony was so impaired it could not possibly have met the burden of clear, convincing and unequivocal proof.

V. THE DISTRICT COURT'S FINDING THAT THE SOVIET DEPOSITIONS WERE UNRELIABLE WAS NOT MANIFESTLY ERRONEOUS

The District Court found: "I have concluded that these depositions, insofar as they purport to inculpate defendant, are unreliable . . . " (Pet. App. 86a). The District Court reviewed the protocols of each of the Soviet deponents, and found numerous material inconsistencies between the deposition testimony and their 1977 protocols.

For example, although Dailide at first categorically testified (1) that he never saw a pistol in petitioner's hand (X934:1-2); (2) that he did not know if petitioner received any property or clothing from the Jews (X953:6-8) and even more strongly that "Kungys did not have much. He came with one suitcase and left with one suitcase." (X953: 12-14); (3) that he did not see a wardrobe and two suitcases filled with clothing in Kungys' home (X953:18); (4) that only Germans fired shots at the Jews (X956:8); (5) that he did not see Lithuanians fire shots (X956:11); (6) that he could not tell if Lithuanian police participated in the shooting (X958:24); (7) that he did not know if mem-

bers of a Lithuanian detachment were present at the shooting ditch (X959:4); and (8) that he did not see savage behavior toward the Jewish children (X965:11)—he then apologized and directly contradicted his own testimony on each of these matters after being impeached with a 1977 "protocol," which he did not even recall giving (X963:12), did not recall reading (X964:24), and could not recall what he told the procurator in 1977 (X965:19). In light of such almost total contradictions, the District Court found,

> "One is also left to speculate whether what is stated in the protocol is true, whether what Dailide first testified to is true or whether both the protocol and the original testimony are false insofar as it relates to defendant. . . . One can only speculate how much more of the protocol was the invention of the interrogators." (Pet. App. 103a).

Such equivocal and contradictory evidence could hardly meet any evidentiary test, let alone the doubt-free test.

After its review of the record, the Court of Appeals bypassed the District Court's ruling as to the unreliability and inadmissability of the Soviet depositions. Yet, the amici in support of the Government would have this Court take into consideration the clearly inadmissible and unreliable Soviet depositions as the basis for establishing a mere "possibility" test for materiality which would not even require admissable proof of the existence of an ultimate disqualifying fact. (WJC BR. 15-19; ADL BR. 17-19). Such a standard of materiality would reduce the doubt-free test to a mockery. *Schneiderman v. United States*, 320 U.S. 118 (1943).

Respectfully submitted,

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